Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1976

No. 76-1609

STATE OF INDIANA,
Petitioner,

vs.

SCOTTSDALE MALL,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner fails to provide the relevant substantive sequence of events and hence fails to state and address itself to the question before and decided by the Court of Appeals. That sequence is clearly set forth at pages 2 through 7 of the Opinion of the Court of Appeals and, somewhat rearranged, is as follows:

1. The so-called "South Bend bypass" of U.S. 20 from west of South Bend to east of South Bend began in the early fifties and it was until 1973 exclusively and as to each of its segments a federal project. As of 1973, the western segment from U.S. 20 to U.S. 31 had been completed. The remainder of the bypass was, for construction purposes, divided into three segments, the first of which was from U.S. 31 east to U.S. 331 and is the segment which immediately involves respondent's land. As of 1973, as to this segment, 214 of the total of 237 steps necessary for the construction of a federal highway had been accomplished. The segment had received program approval, location approval and design approval; some $162,000 of federal money had been expended for preliminary engineering which was virtually completed; and the State was proposing to go forward with land acquisition, the final preparatory action to actual construction of the segment.

2. In 1970, the Congress enacted The National Environmental Policy Act (NEPA), 42 USC §4321, et seq. Petitioner has conceded that NEPA applied to this and other projects even though commenced prior to the enactment of NEPA. Petitioner has also conceded, in the District Court and in the Court of Appeals, that as of 1973, the South Bend bypass and all and each of its parts or segments constituted "major

federal action" requiring compliance with NEPA. Subsequent to the enactment of NEPA, the federal authorities repeatedly advised petitioner that NEPA compliance, specifically the preparation and processing of an Environmental Impact Statement, would be required in connection with the remaining segments of the bypass.

3. In 1973, petitioner requested permission from the federal authorities to commence right-of-way acquisition on the subject segment from U.S. 31 to U.S. 331. This permission was denied due to petitioner's continued failure to seek NEPA compliance. Petitioner then advised that it would proceed with this first segment of the remaining three segments as a State project without further federal funding. The federal authorities thereupon and correctly advised that the project (the "major federal action") for NEPA purposes was the remainder of the bypass, the three segments yet to be built. Petitioner did not and does not contest this determination. Rather, in May of 1974, petitioner prepared and submitted a so-called Environmental Impact Statement which purported to cover all three of the easterly segments and this document was accepted and/or approved by the federal authorities.

4. In 1968, respondent acquired the shopping center site. At that time, respondent was aware that the petitioner planned to build the highway and that it might take a certain portion of the site. Prior to the purchase and subsequent to it and prior to the construction of the center, respondent repeatedly sought to discover when or if it was to be built and, if it was to be built, to affect a minor relocation to avoid losing part of the site. On every occasion, over a period of three or four years, the response was the same: it was too late, the

project would go forward forthwith. And, nothing happened. Finally, respondent, faced with the demands of its major potential tenants that it proceed or else and with the full knowledge of petitioner, began and ultimately completed the construction of its $20 million dollar facility. Petitioner had a statutory means of preventing construction by giving notice of its intention to take, which notice was never given. Indiana Code, Section 8-13-2-12.

5. Respondent's request for relocation continued. In 1972, respondent acquired 20 acres south of the shopping center and in 1974 presented petitioner with several engineered relocation alternatives involving this 20 acre parcel and offered to give petitioner the required right-of-way for the relocated highway. This was an offer that even petitioner recognized as offering a savings of over $2 million dollars. This offer was considered for some six months and finally rejected by petitioner in late 1974.

6. This action was commenced in January of 1975 against petitioner and the United States Department of Transportation. Immediately, the Department of Transportation withdrew its prior approval of the so-call Environmental Impact Statement. The Statement was described as "procedurally defective." This was a reference to the fact that it had not been properly circulated. The defect, while procedural, was not technical since, whether the affect of a given "major federal action" upon the total human environment is ecological or economic, the essence of the NEPA process is full disclosure circulation, reaction and comment. In addition, the EIS was patently substantively inadequate. It was a pitiful pretense. It dealt with the facts of the past and ignored the realities of the present; and

it could have been about any section of highway in these United States if one but changed some names.

7. On February 12, 1975, the District Court entered a preliminary injunction, without the necessity of a hearing but based on the agreement of the parties. For all intents and purposes the parties agreed that the remaining segments of the bypass were a "major federal action" to which NEPA applied and that there had been no compliance with NEPA. The District Court and the parties recognized and concluded that the petitioner had three options: (1) comply with NEPA; (2) do nothing; (3) or withdraw the entire project from federal funding which would then present for trial the issue of whether withdrawal at this stage could avoid NEPA compliance.

8. In January of 1975, President Ford had released previously impounded federal highway funds. This resulted in a maximum availability of $185 million dollars to the State of Indiana which had to be allocated or spent by July 1, 1975. It became imperative to qualify a sufficient number of highway projects in Indiana to absorb the total fund since the penalty for failure to use the money was the loss of that which wasn't spent or at least allocated. Therefore, at the time of and for some time after the District Court's Order it was imperative that the bypass be retained as a federal project in the event that it was needed, as a target for the unspent portion of the unimpounded funds. However, petitioner was able by July 1 to allocate all the federal money to other and presumably less controversial projects. Accordingly, petitioner advised the District Court by copy of a letter to the State Attorney dated July 15, as follows:

"The Honorable Theodore L. Sendak
Attorney General
State of Indiana
Room 219, State House
Indianapolis, Indiana

Attention: Deputy Attorney General Tony Metz

Dear Sir:

The action taken in Washington this year to release Federally impounded highway funds has resulted in a greatly increased use of these funds by the Indiana State Highway Commission. In the Fiscal Year just ended, we have used over 185 million dollars of Federal funds, whereas our original obligation authority only amounted to 72.5 million dollars. This means that the formerly impounded funds will not be available for future work by the State Highway Commission.

As indicated in the attached memorandum, our staff has reviewed the future program planning and determined that a transfer will be necessary for several projects from Federal-aid financing to 100% State financed projects. We have today initiated the transfer of a portion of these projects which includes the projects on U.S. 20 from 0.4 miles east of State Road 331 to present U.S. 20, east of Elkhart.

In view of this action, it is requested that you take the appropriate steps to resolve the current litigation in Federal Court pertaining to the U.S. 20 projects and notify this office when we may proceed. I am transmitting herewith a copy of the de-programming documents, which have been submitted to the Division Office of the Federal Highway Administration on this date.

Very truly yours,
Richard A. Boehning
Chairman"

9. As petitioner admits, the transfer of this project from federal to state incurs no loss of federal funds and is but "a balancing act." You simply move projects back and forth, at will, being sure only to have sufficient projects, qualifying for federal money, to be sure that you spend all the federal money.

10. Subsequent to the letter of July 15, the District Court heard the case on the merits and held that petitioner's action of July 15 withdrawing the project from federal funding enabled petitioner to avoid compliance with NEPA. The Court of Appeals reversed holding, in essence, that the State could waive federal funding but could not, on the facts in this case, by that process, avoid compliance with NEPA.

11. The question before the Court of Appeals and the question decided by the Court of Appeals was not whether the bypass or its segments constituted a major federal action to which NEPA applied. We all agreed. It was and it did. Nor was the question whether the petitioner could waive federal funding. It had and it could. Nor was the question the precise point at which a highway project becomes federal, the Court, deeming such a decision unnecessary. The single question was whether, on the facts of this case, petitioner's act of withdrawing the project from federal funding enabled it to escape and avoid compliance with NEPA.

ARGUMENT

Petitioner's argument in the Courts below was that the State had a continuing option to use federal funds up to the point of Plans, Specifications & Engineering (PS&E) approval and that its obligation to comply with NEPA came and went with the retention of that

option. PS&E is the last step in the process prior to actual construction, so petitioner's argument was that a project could be pulled from federal funding and the necessity for NEPA compliance right up to the point of construction. Petitioner also acknowledged that the process involved no loss of federal funds since all that was involved was a transfer of projects back and forth from State to federal maintaining sufficient federal projects to use all the available federal money. The difficulty with this argument is that it provides a process which destroys the procedural guarantees contained in NEPA and aborts its substantive effect. What can and will happen is that highway projects at the State level will be divided into those which are tentatively to be federal and those tentatively State. The federal projects can then be processed with the same pro forma compliance with NEPA as occurred in this case with the same cooperation, on that pro forma compliance, from the federal authorities as we had here, since the federal bureaucracy is no fonder of NEPA than are the State bureaucracies. With reference to each federal project, if there is no complaint up to the "final step" of funding authority, it is then funded federally and immediately built and it is too late for anyone to demand compliance with NEPA. If a complaint is made with reference to a federal project prior to that "final step" that project is deprogrammed to a State project and some other State project is made federal and no compliance with NEPA is required and no federal dollars are lost. If the argument were to be accepted what the concerned citizens of this country get, whether their concern is wildlife or wild water, the urban society or the urban economy, is either token pro forma compliance with NEPA in non-

controversial projects or none at all where controversy exists.

The Court of Appeals rejected petitioner's argument on the basis of the mandate contained in NEPA. The Court said:

> "Were we to hold otherwise, we would give little, if any, effect to the Congressional directive so cogently expressed by the phrase 'to the fullest extent possible.'" (Petitioner's Appendix A-11)

The Court held that petitioner could not avoid NEPA by the expediency of withdrawal from federal funding and juggling federal and state money. That decision is in total accord with the decisions of Ninth, Fifth and Fourth Circuits. We refer to:

> *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973),
>
> *Named Individual Member of San Antonio Con. Society v. Texas Highway Department*, 466 F.2d 1013 (5th Cir., 1971);
>
> *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974).

Petitioner's argument is an understandable effort to convince this Court that the questions in this case are of some broader significance. First, there is at page 6 a reference to "federalism" and at page 11 to 23 U.S.C. 145 to the effect that the fact of federal funding "shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed." This case has nothing to do with federal-state conflict or state's rights. It does have to do with the fact that federal funds carry with them the obligation to comply with federal law. Next, at page 10, petitioner actually claims that the Court of Appeals has created "an impossible situation" since the EIS would be the responsibility of the Department

of Transportation which is not a party and "has no interest in the bypass" since it is not to be federally funded. This is simply an effort to create a problem where none exists. It is the State of Indiana who insisted that NEPA compliance was not required. The Court of Appeals ruled otherwise and enjoined the State from proceeding with the project without NEPA compliance and there is every reason to presume that the federal government will respond to and comply with the law as found to be by a Federal Court.

Petitioner at pages 7, 9, 10-11 presents an argument, part of substance and part of procedure, which was not made before either the District Court or the Court of Appeals and not worth making there or here. Petitioner at page 7 states that there is really no federal involvement in highways as such; that the federal involvement is in the financing of highways not their construction. Petitioner seems to conclude at page 9 and again at page 11 that: a highway cannot be a "major federal action;" only the money is; the EIS requirement does not apply directly to the State; and in the event of "a violation of the EIS requirements" all a Court can do is stop the Federal authorities from the payment of the money (which the State keeps anyway by moving it to another project) but it can't stop the State or the project. This is inane. There must be twenty cases dealing with the applicability of NEPA to different actions, including those cited by petitioner and every one defines actions in terms of the project itself, not the money. Indeed, some of the cases don't even involve money. In addition, in case after case, the order of the Court has been directed against the project and against the State. We refer to *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974) and *Scherr v.*

Volpe, 466 F.2d 1027 (7th Cir. 1972). In *Named Individual Members of San Antonio Con. Society v. Texas Highway Dept.*, 466 F.2d 1013 (5th Cir. 1971), the State of Texas argued that withdrawal from federal funding affected the substantive result that NEPA compliance was avoided and the procedural result that it could not be required. The Court at page 1027 responded:

> "We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws. The supremacy of federal law has been recognized as a fundamental principle of our Government since the birth of the Republic. United States Constitution, Art. VI, cl. 2. The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another."

And in *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir. 1973) the State of California made the precise argument here made by the petitioner in connection with a similar federal statute. That argument and the Court's response to it appears at page 561:

> "The Commission's position on this appeal is that these provisions are applicable only in the sense that compliance is necessary in order to obtain federal funding. Under this interpretation the Commission would have an option to obtain federal funding by complying with these provisions. Failure to comply merely would deprive the State of

> federal funds. The determination whether the condition precedent to federal funding had occurred would be appropriate only at the final state of the approval process outlined in 23 U.S.C. §106(a), the so-called 'construction approval.' As a consequence, the Commission argues, it would have been appropriate for the District Court to have entered a declaratory judgment that the statutes here involved were applicable if federal funds are to become available and to have enjoined the Federal Government from making funds available to the project 'until and unless the requirements are met and approved by the Court,' (Appellant's Reply Brief, p. 5.) Under no circumstances should a state be enjoined to comply. The carrot of federal funding, not the stick of an injunction, insists the Commission, is the only compulsion authorized by the applicable statutory and regulatory scheme.
>
> [1] We do not agree with the Commission's interpretation of these provisions. The general purpose of these statutes and regulations is to assure that projects for which federal funding might become available are carried out in a way that will afford the protection both to those displaced that 42 U.S.C. §§4622-4655 provides and to the environment, including public parks, that is commanded by 49 U.S.C. §1653(f) and 23 U.S.C. §138. The effectuation of this purpose makes necessary both the carrot and the stick. Without the stick there will be fewer instances in which compliance with these provisions will be achieved. This is true because the Commission under its interpretation would be able to secure the program approval contemplated by 23 U.S.C. §105 for a greater number of projects than could be funded by the sums apportioned and made available pursuant to 23 U.S.C. §104 and §106(a) and to qualify for actual funding only those projects with respect to which compliance proved to be relatively easy and inexpensive."

Such a constrained view of NEPA is typical of State bureaucracies who don't want to be bothered by such foolish things as the effect upon the human economic and ecologic environment. Such a view insults the plea of the Congress contained in the Act itself, "to the fullest extent possible." Finally, the Act is made applicable to major federal actions "significantly affecting the quality of human environment." It is the project, the highway, created by the money, that affects the human environment.

Petitioner has another new argument at page 12 that insists that the bypass hasn't become "federal" yet since that would occur at the land acquisition stage or maybe the construction stage, because it is land acquisition and construction that produce the affect on the environment. In the first place, the bypass is well into the land acquisition phase and counsel must be aware that virtually all the land for the U.S. 31/U.S. 331 segment has been acquired. Secondly, to argue that you don't have to comply with NEPA until after you've constructed the highway doesn't make sense. The guts of NEPA is the necessity for consideration of all alternatives. Finally, the argument in this case was not and is not that the bypass has not become federal. We've all acknowledged it did. Why else did the State prepare and file an EIS? Why else did the State "withdraw" the project from federal funding? The argument is that the State insists that they can defederalize the project in order to avoid NEPA compliance.

Petitioner's final plea appears at page 13 where this marvelous statement appears: "If there is *any* holding of the Court of Appeals in this case, *such* holding creates a conflict among the circuits. . . ." (Emphasis

ours) In other words: whatever the Court of Appeals said, someone must disagree. The Court of Appeals, in its opinion, stated "The precise point at which a federally programmed state highway project becomes irrevocably federal in character for NEPA purposes is a decision we deem unnecessary to make. . . ." (Petitioner's Appendix A-11) The Court went on to say that whatever this "precise point" might be it had long since passed in this case. Hence, the rule in this case is on the facts of this case and it is this: where a State proceeds with a highway project as a federal project up to the very point of construction, purporting to comply with NEPA during that entire time, and where that compliance is attacked and held by a federal court to be inadequate, that State cannot avoid full compliance and the injunctive order of the Court by the simple expedient of withdrawing the project from federal funding and by shifting state and federal funds from project to project so as to suffer no loss of federal funds. Such a holding is totally in accord with the rule in other circuits. We refer again to: *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973), at p. 562; *Named Individual Member of San Antonio Con. Society v. Texas Highway Department*, 466 F.2d 1013 (5th Cir., 1971); *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974). And such a holding is the only holding which affords to NEPA an ounce of substance. Petitioner cites no case in which withdrawal from federal funding at any time, by any means, or for whatever purpose has been held to constitute a means of NEPA avoidance.

Petitioner concludes with the remarkable statement that "[U]ntil land acquisition and construction are *ready to proceed* any action is *de minimus* rather than

major, is state rather than federal, and does not significantly affect the quality of the human environment." (Emphasis ours) This case began because acquisition of our land was proceeding and construction was ready to begin. So even in the words of petitioner: the action is major; the action is federal; the action significantly affects the quality of the human environment.

CONCLUSION

The issue here is whether petitioner can avoid NEPA, by bookkeping transfer of federal funds to other projects. The Court of Appeals held that the project before the Court had gone so far as a federal project and was so near the point of construction that the Court of Appeals wasn't presented with any nice problem as to the precise earliest point at which NEPA becomes applicable. By any test, this project had long since passed that point.

Thus, the decision of the Court of Appeals merely followed the established decisions of other circuits to the effect that once NEPA is applicable Petitioner cannot withdraw from NEPA and avoid its application and subvert the purposes of NEPA by bookkeeping changes to shift the federal funds to other projects.

Respectfully submitted,

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